A

YU KIM SENG

v.

PP

B

HIGH COURT MALAYA, ALOR STAR
ZAINAL ADZAM GHANI J
[CRIMINAL APPEAL NO: 44-10-2007]
27 JUNE 2007

C ***CRIMINAL PROCEDURE:*** *Charge - Defective charge - Error or omission in charge - Whether material - Whether appellant misled by error or omission*

CRIMINAL PROCEDURE: *Interpreter - Absence of - Whether*
D *appellant understood charge - Whether appellant understood nature and consequences of his plea of guilt*

This was an appeal by the appellant against the decision of the Magistrate's Court convicting him under s. 411 of the Penal Code ('Code') after he pleaded guilty, and sentencing him to six months'
E imprisonment and a fine of RM2,000. The main argument by the appellant was that the charge against him was defective as it was framed with the phrase "telah dengan curangnya memiliki" ("was dishonestly in possession") when s. 411 of the Code, which created the offence, contained the phrase "dengan curangnya
F menerima" ("dishonestly receives or retains"). The appellant also complained about the absence of an interpreter at the proceedings in the court below.

Held (dismissing the appeal, and upholding the decision and
G **sentence of the Magistrate's Court):**

(1) From the relevant case authorities, it is quite clear that before any error or omission in a charge can be found to be defective or material the court should establish whether the accused
H was in fact misled by the error or omission. In the present case, the appellant pleaded guilty and the charge stated "memiliki" ("in possession") instead of "menerima" ("receives or retains"). The words "possession" and "retention" are almost synonymous unless one wants to be technical. What
I transpired in this case was that there was compliance with s. 152(4) of the Criminal Procedure Code, as the law and section were stated but an error or omission had occurred. The burden was on the appellant to establish that he was in

fact misled by the error or omission. In the circumstances of this case, the appellant was not misled as he pleaded guilty and acknowledged to the facts of the case and, in addition, also admitted to the subject matter of the charge. The omission was more of a technical nature. Therefore, the omission in the charge in this case was not material since the appellant was not in fact misled by it and, as such, it had not caused any failure of justice. (paras 8 & 9)

(2) There was no merit in the appellant's complaint about the absence of a Chinese interpreter at the proceedings in the court below. There was no allegation by the appellant that the notes of evidence were not in order and unless there was evidence to show otherwise, the notes of evidence must be accepted as being properly recorded by the Magistrate. The appellant, at the time the charge was read, should have informed the Magistrate that he could not understand Bahasa Malaysia. The records showed otherwise as the appellant not only pleaded guilty after the charge was read and explained to him but, in addition, also admitted to the facts of the case and the subject matter of the charge. It was recorded that after the charge was explained to the appellant and he pleaded guilty, he understood the nature and consequences of his plea. The appellant could further plea in mitigation: "Saya kerja pemandu lori. Pendapatan lebih kurang 1,000. Kami anak 4. Pohon hukuman ringan". (para 10)

Case(s) referred to:
Abdul Hamid Udin v. PP [2000] 1 LNS 198
Pie Chin v. PP [1983] 1 LNS 70
Tay Leong Siak v. PP [2002] MLJ 197 ***(refd)***
Zulkiflee Mohd Dom v. PP [1997] 3 CLJ Supp 290

Legislation referred to:
Criminal Procedure Code, s. 152(1), (4), 154, 156, 422
Dangerous Drugs Act 1952, s. 6, 12(2)
Penal Code, s. 242, 411

For the appellant - BG Lee; M/s BG Lee & Co
For the defendant - Azhar Mokhtar DPP

Reported by Suresh Nathan

A

JUDGMENT

Zainal Adzam Ghani J:

[1] This is an appeal from the decision of the Magistrate Court, Alor Star convicting the appellant under s. 411 of the Penal Code after he pleaded guilty and sentencing him to six months imprisonment and a fine of RM2,000. The main argument by the learned counsel for the appellant was that the charge against the appellant was defective as it was framed with the phrase "telah dengan curangnya memiliki" ("was dishonestly in possession") when s. 411 which created the offence contained the phrase "dengan curangnya menerima" ("dishonestly receives or retain"). This argument incidentally was not included specifically in the appellant's petition of appeal. The charge against the appellant in the court below reads as follows:

> Bahawa kamu pada 22/06/2006 jam lebih kurang 7.00 petang, di Depan Rumah No. 241, Batu 8 3/4, Simpang Empat, Alor Star, di dalam Daerah Kota Star, di dalam negeri Kedah dengan curang memiliki harta alih iaitu satu guni plastik mengandungi wayar tembaga, bernilai lebih kurang RM 1,220.00, hak milik Telekom Malaysia, di mana kamu tahu atau ada sebab mempercayai bahawa harta itu adalah harta curi, oleh yang demikian itu, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 411 Kanun Keseksaan.

[2] The learned counsel referred to the case of *Tay Leong Siak v. PP* [2002] MLJ 197 where a similar error in the charge under s. 411 of the Penal Code happened. In his judgment Low Hop Bing J, (as His Lordship was then) stated:

> On my part, it is necessary and advisable to hark back to first principles in criminal law and procedure. The charge states that the accused "telah dengan curangnya memiliki" (or English translation reads "was dishonestly in possession of"). In my view, the charge appears to be out of focus because the offence created under the said s. 411 is "dengan curangnya menerima atau menyimpan" (or in English, "dishonestly receives or retain". The said s. 411 makes no mention whatsoever of possession. The words enacted in the said s. 411 creating the offence are crucial and Page 5 significant. It is trite law that the charge in question must be precisely formulated to include the specific accusation against the accused who has the right to know and must have notice of the nature of the charge at the first opportunity, so that the accused is forewarned with clarity and certainty the essential elements or ingredients that the prosecution has to establish against

him in order to ensure that he can be forearmed in his defence for the purpose of directing all the evidence exclusively to the specific charge. It is true that s. 156 of the Criminal Procedure Code (FMS Cap. 6) ("CPC") states that no error in stating either the offence or the particulars required to be stated in the charge, and that no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission. S. 156 of the CPC was invoked eg.

(1) in *Saw Tuan Cheong v. Public Prosecutor* [1946] 1 LNS 31; [1946] 12 MLJ 143, where the accused was not misled;

(2) in *Low Seng Wah v. Public Prosecutor* [1961] 1 LNS 55; [1962] 28 MLJ 107, where there was no miscarriage of justice;

(3) in *Abdul Hamid bin Udin v. Public Prosecutor* [2000] 1 LNS 198; [2000] 6 MLJ 334 where the wrong section ie s. 12(2) of the Dangerous Drugs Act 1952 was stated in the charge when it should be s. 6 of the same Act, which was held to be curable under s. 422 of the CPC;

(4) in *Lee A Ba v. The Public Prosecutor* [No. 36 of 1966] reported in *Public Prosecutor v. Oie Hee Koi & Associated Appeals* [1967] 1 LNS 132; [1968] 1 MLJ 148, Page 7 JCPC, where error in nomenclature was of no consequence;

(5) in *Zulkiflee bin Mohd Dom v. Public Prosecutor* [1997] 3 CLJ Supp 290; [1997] 4 MLJ 161, where the omission to set out the particulars of deception practised on the complainant was not material;

(6) in *Pie Bin Chin v. Public Prosecutor* [1983] 1 LNS 70; [1985] 1 MLJ 235, where the misdescription of the word "Federation" instead of the word "State" in the charge against the accused was held to be curable under s. 422 of the CPC.

In the instant case, the error or omission is substantial and material in that the offence under the said s. 411 is one of dishonestly receiving or retaining stolen property and not possession. The charge does not disclose an offence under the said s. 411, as s. 152(i) of the CPC has not been complied with. S. 152(i) of the CPC provides that every charge under this Code shall state the offence with which the accused is charged. This is a mandatory provision and it is the bounden duty of the prosecution to particularise the charge sufficiently so that the accused has adequate notice thereof.

[3] In that case the accused claimed trial and the decision of the lower court was after a full hearing. The learned judge considered that the error or omission was "substantial and material" in that the charge did not disclose an offence under s. 411 of the Penal Code and thereby contravening s. 152(1) of the Criminal Procedure Code. The learned judge did with consider whether the accused was misled by the error or omission.

[4] With due respect to the learned judge the provision of s. 156 of the Criminal Procedure Code mentions, *inter alia*, "error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case, as material unless the accused was in fact misled by such error or omission" (emphasis added). That provision do not make any reference as to whether the "error" was substantial or not. The provision clearly states that the error or omission shall be regarded as material only if in fact the accused was misled by such error or omission. The court must therefore before finding that a charge is defective for any error or omission determine whether the accused was in fact misled by such error or omission. The test which covers all errors and omission in a charge is not whether the error or omission is substantial or not. It is a question of fact and each case must depend on it's own facts and circumstances. This can be seen from decided authorities, some which are among those cited by the learned judge.

[5] In the case of *Abdul Hamid b. Udin v. Public Prosecutor* [2000] 1 LNS 198 a wrong section ie, s. 12(2) of the Dangerous Drugs Act 1952 was stated in the charge when it should be s. 6 of the same Act was held to be curable under s. 422 of the Criminal Procedure Code. Abdul Wahab J in his judgment stated:

> Very clearly appellant was wrongly charged under s. 12(2). Even though the parties have not submitted upon it, the court must nevertheless consider whether this plain and obvious error is curable under s. 422 of the Code which provides:
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> Subject to the provisions contained in this Chapter no finding sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or any inquiry or other proceedings under this Code;

(b) the want of any sanction; or the improper admission or rejection of any evidence, A

unless such error, omission, irregularity, want or improper admission or rejection of evidence has occasioned a failure of justice.

In *Bong Kim Son v. PP* [1997] 4 CLJ Supp 477; [1998] 1 MLJ 645, following *Re Rasiah Munusamy* [1983] 1 LNS 26; [1983] 2 MLJ 294, and *Ahmad bin Hashim v. PP* [1950] 1 LNS 102; [1950] MLJ 1 (CA), *Papathy v. PP* [1955] 1 LNS 86; [1956] MLJ 18 (CA) and *Cheong Sik Kwan v. PP* [1959] 1 LNS 14; [1959] MLJ 189 (CA) it was held that s. 422 cannot be applied to cure an illegality. In those cases, the illegality was non-compliance with s. 133 of the Code, being the mandatory procedure with regard to commencement and cognizance of private prosecution. Section 152(iv) of the Code requires that the law and the section against which the offence is said to have been committed shall be stated in the charge. On the face of it the charge complies with s. 152(iv) of the Code since the law and the section was stated. While there is an error in stating the section number, there is no doubt whatsoever that the appellant was charged for the offence of possession of cannabis under the Act. Illegality connotes the failure to comply with the law. What appears to have occurred in this case is that there is compliance, but that there is an error. B C D E

[6] The provisions of s. 154 and s. 156 of the Criminal Procedure Code was analysed and discussed in detail by Augustine Paul, JC (as His Lordship was then in the case of *Zulkiflee bin Mohd Dom v. PP* [1997] 3 CLJ Supp 290 as follows: F

Section 154 is a general provision while s. 156 serves to qualify it. Section 154 will render a charge defective if an objection to its non-compliance is taken before the commencement of the trial while s. 156 will not invalidate such a charge if the objection is taken during or at the conclusion of the trial in the circumstances mentioned in the section. This becomes apparent when it is realized that the object of s. 154 is, firstly, to ensure that the accused has sufficient notice of the matter with which he is charged as otherwise he will be seriously prejudiced in his defence and, secondly, to enable the court to keep in view the real points in issue and to confine the evidence to such matters. This as of necessity means, in the light of the explicit provisions of s. 156, that the requirements of s. 154 arise for consideration before the commencement of the trial with appropriate amendments, if necessary. In this regard I refer to *PP v. Raymond Chia Kim Chwee & Anor* [1983] CLJ 798 (Rep); [1983] 1 CLJ 321; [1985] 2 MLJ 63 where Mohamed Azmi J (as he then was) in commenting on this section said at p 66: G H I

> ... the charge must give such particulars as are necessary to enable the accused to prepare his defence or give proper instructions to his counsel before trial. (Emphasis added).

On the other hand the words in s. 156 '... at any stage of the case ...' and '... Unless the accused was in fact misled by such error or omission ...' show that this section is activated after the commencement of the trial. This is obvious as the question of the accused being misled or not will only arise at that stage. The section states in unmistakable terms that if the accused has not been misled such error or omission to state the offence or the particulars required shall not be regarded as material. The fact that the accused has not been misled despite the defect in the charge amounts to the objects of s. 154 being satisfied. It follows that the object of s. 156 is to ensure that technical defects in the charge should not be allowed to defeat the ends of justice. In considering the application and object of this section the 2 AIR *Commentaries on The Code of Criminal Procedure* [1973] says at pp 594-594:

> It is for the court to decide in each case whether the defect in a charge has misled the accused. The question of prejudice to the accused is ultimately one of inference from all the facts and circumstances of the case. The court will be slow to entertain the question of prejudice when the details are not furnished. In considering the question of whether the accused has been prejudiced in his defence by the defect in the charge, regard must be had to the fact that the objection to the frame of the charge was not raised till a late stage of the proceedings.
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> The section is aimed, among other things, at objections on the ground of variance between the charge and the evidence. But the fundamental principle in all criminal charges is that the accused should not be prejudiced in his defence and, therefore, where a charge expressed in vague terms has been understood in a certain sense and proceedings have gone on on such basis, it is not thereafter open to the prosecution to contend that the charge means something else. The object of the section is that technical defects in the charge should not be allowed to defeat the ends of justice.

The corollary is that a conviction cannot be set aside unless the accused has been misled by the omission of an essential ingredient: in the charge as the section is in mandatory terms (see *Low Seng Wah v. PP* [1961] 1 LNS 55; [1962] 28 MLJ 107). The burden is on the accused to establish that he was misled by the error or omission. As Neal J said in *Low Seng Wah v. PP* [1961] 1 LNS 55; [1962] 28 MLJ 107 in considering s. 156 of the Code, at p 109:

> It appears to me, therefore, that to succeed on this appeal the appellant must established two things. Firstly, that an essential ingredient of the offence was omitted from the charge and secondly, he was misled by that omission.

[7] In *Pie b. Chin v. PP* [1983] 1 LNS 70 where the charge which erroneously described the appellant as a Federal Government agent and not as an agent of the State Government was held to be curable under s. 422 of the Criminal Procedure Code. On the application of s. 422 Wan Yahaya J (as His Lordship was then) stated:

> The application of this section, however, is subjected to two conditions. First, the error must have been committed by a Court of competent jurisdiction and secondly, the mistake has not resulted in a failure of justice. In our present appeal there is nothing to suggest that the trial Court was of incompetent jurisdiction and insofar as the failure of justice is concerned, I cannot visualise its presence.
>
> As a rule of the thumb prejudice is an essential ingredient to the failure of justice. The question to be considered here is whether the Appellant has been in any way prejudiced in his defence by this error. If he is not, then no failure of justice has been occasioned. The prosecution in our current case has mistakenly described the world 'State' as 'Federal' in the charges. But for this small error the nature and substance of the offence with which the Appellant was charged remained the same, ie, he, as an agent, corruptly accepted gratification for doing an Act in respect of his principal's affairs. Such an error, to my mind, is one of form rather than substance.

[8] From the authorities above it is quite clear that before any error or omission in a charge can be found to be defective or material the court should establish whether the accused was in fact misled by the error or omission. These are the actual words of s. 156 of the Criminal Procedure Code. As stated by AIR *Commentaries on The Code of Criminal Procedure* [1973] the object of s. 156 is that technical defect in the charge should not be allowed to defeat the ends of justice. In the present case the appellant pleaded guilty and the charge stated "memiliki" ("possession") instead of "menerima" ("receive or retain"). The words "possession" and "retention" are almost synonymous unless one want to be technical. Apart from that the charge contained the words "... harta alih iaitu satu guni plastic mengandungi wayar tembaga, bernilai lebih kurang RM1,220 hak milik Telekom

A Malaysia, di mana kamu tahu atau ada sebab mempercayai bahawa harta itu adalah harta curi, oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum dibawah s. 411 Kanun Keseksaan". From illustration (a) to s. 156 it is quite clear that even an omission to include an element of the offence such
B as the word "fraudulently" in a charge under s. 242 of the Penal Code shall not be regarded as material unless the accused was misled by the omission.

[9] Under such circumstances I am constrained to find that
C what transpired in this case was that there was compliance with s. 152(4) of the Code as the law and section was stated but an error or omission had occurred. The burden was on the appellant to establish that he was in fact misled by the error or omission. The complaint of the appellant was more about the absence of an
D interpreter which I shall deal with later. In the circumstances of this case I am of the opinion that the appellant was not misled as he pleaded guilty and acknowledged to the facts of the case (P1) and in addition also admitted to the subject matter of charge the "wayar tembaga" (P2). The omission was more of a technical
E nature. The omissions or errors in the other case seems to be more serious. In *Abdul Hamid b. Udin v. PP* the wrong section of the Dangerous Act 1952 was in fact stated in the charge. In *Zulkiflee b. Mohd. Dom v. PP* the particulars of deception practiced by the appellant was not included in the charge. Applying the
F mandatory requirements of s. 156 of the Code I find therefore that the omission in the charge in this case as not material as the appellant was not in fact misled by the omission. As such, I also find the omission has not caused any failure of justice to invoke s. 422 of the Code.

G **[10]** On the appellant's complaint about the absence of the Chinese interpreter in the proceedings at the court below, I find that there is no merit to it. There was no allegation by the appellant that the notes of evidence was not in order. Unless
H there are evidence to show otherwise I have to accept the notes of evidence as being property recorded by the Magistrate. The appellant at the time when the charge was read should have informed the Magistrate that he could not understand Bahasa Malaysia. The records showed otherwise as the appellant not only
I pleaded guilty after the charge was read and explained to him but in addition also admitted to the facts of the case and the subject matter of the charge in the form of exh. P1. It was recorded that after the charge was explained to the appellant and he pleaded

guilty, he understood the nature and consequences of his plea. The appellant could further plea in mitigation: "Saya kerja pemandu lori. Pendapatan lebih kurang 1,000. Kami anak 4. Pohon hukuman ringan".

[11] This appeal is dismissed and the decision and sentence of the Magistrate Court is upheld.